United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1644 B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

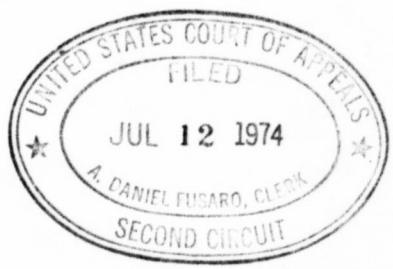
JOHN SHUTTLE,
Petitioner-Appellant,

v.

Docket No. 74-1644

JULIUS MOEYKENS,
Respondent-Appellee

BRIEF FOR APPELLEE



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ON THE BRIEF:

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COUNTER STATEMENT OF THE ISSUES

(1) Has Appellant laid a proper procedural foundation for the assertion, in a collateral Federal proceeding, of a claim that a State court judge was disqualified from presiding at sentencing?

(2) By sitting as a sentencing judge, did the State court judge violate Appellant's Fourteenth Amendment right to due process?

COUNTER STATEMENT OF THE CASE

Appellee is in agreement with Section 1., The Crime Charged and Section 3., Sentencing and Appeals in Appellant's Statement of the Case. To reflect our disagreement with Appellant's Section 2., we have rewritten it as a counter-statement, maintaining his format.

2. Motion to Disqualify

Shuttle was sentenced on January 5, 1972 by Judge Connarn. Prior to sentencing, Judge Connarn heard and considered five motions which had been filed on Shuttle's behalf. One of these motions was entitled "Motion to Dismiss and for Other Relief," and was filed on December 28, 1971.

That Motion claimed bias and prejudice on Judge Connarn's part solely as a result of his receipt and review of a pre-sentence report,[1] and requested three

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1 The implication in Appellant's Statement of the Case that the Motion raised an issue of judicial bias based on prior contacts with the Appellant, is completely misleading. Neither the Motion, nor argument by Appellant's counsel at the January 5, 1972 hearing on the Motion, made any reference at all to prior contacts. (S. 31-32).

In fact, in arguing to the Court, the State's Attorney voiced his understanding that the Motion raised the same issues as others being argued concurrently to the Court. (S. 33).

In denying the Motion the Court stated its reasons which clearly reflected the Court's understanding to be that the Motion was concerned solely with prejudice resulting from a reading of the pre-sentence report. (S. 37).

alternative forms of relief.[2]

Although unrelated to the Motion, the record evidences certain prior judicial contact between Appellant and Judge Connarn as follows:

(1) In 1965 or 1966, Judge Connarn, as Attorney General of Vermont, had represented the State in connection with a post-conviction review brought by Shuttle; Judge Connarn's participation was limited to that of making "some argument" before the Vermont Supreme Court. (Tr. 42, 44-45).[3]

(2) Shuttle had on previous occasions, in both criminal and civil proceedings, appeared before Judge Connarn as a litigant. (Tr. 40, 42-44).

(3) A former law associate of Judge Connarn, Norbert J. Towne, was involved in the crime in which Shuttle was convicted. (Tr. 48-49). The $85 check in question, made out to Mr. Towne as payee, was stolen from Mr. Towne's offices. (A. 9; Tr. 48). Mr. Towne was a probable witness for the State if Appellant had not elected to

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2 After alleging bias based on a review of the pre-sentence report, the Motion asked the Court:
1) That the pending charge against him be dismissed.
2) That the presiding judge disqualify himself and refuse to pass sentence.
3) That the pre-sentence report be dismissed and not considered in sentencing.

3 To be consistent with Appellant's Brief, the same transcript references are used throughout; this is a reference to the Transcript of the hearing held by the Washington County Court on September 13 and 14, 1972 and is a part of Document No. 9.

plead guilty to the charge.[4]

After hearing evidence and argument, Judge Connarn denied the Motion, indicating his reasons for his decision.[5]

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4 On pages 4, 9, 10, 14 and 16 of his Brief Appellant repeats and re-emphasizes the claim that Judge Connarn had testified, pursuant to subpoena, against Shuttle in federal court relating to prosecutions against Shuttle. On page 17 Appellant adds, as fact, that Judge Connarn, when testifying, did so in a hostile (to Appellant) and contradictory manner. There is no truth to this claim.

The sole basis for this allegation is Appellant's own testimony before the Washington County Court in support of his petition for post-conviction relief (Tr. 13). The significant fact, ignored by Appellant, is that the Washington County Court did not find this allegation, unsupported as it was by documentation or even by reference to a specific court or proceeding, to be believable. Finding 43 of the Washington County Court (the Findings are attached to Document No. 9), demonstrates the Court's conclusion that the believable evidence was contrary to Appellant's assertions concerning judicial bias. In fact, that Court found much of Appellant's testimony to be unbelievable (see Findings 27(a), 29, 34, 35, 36, 38, 39, 40, 43, 44, 45 and 46).

The lower federal court also noted that Judge Connarn's prior contacts with Appellant were limited to those as a judge and as Vermont Attorney General (Appendix B to Appellant's Brief, p. 4 and footnote 4).

Moreover, the law clerk of the undersigned Assistant Attorney General searched every United States District Court for the District of Vermont file indexed or otherwise traceable, to matters involving Appellant (some 12 or 13 files). None of these records reflect that Judge Connarn ever appeared as a witness in that court in matters involving Appellant. In one case another member of Vermont's judiciary appeared as a witness in a federal habeas corpus proceeding instituted by Appellant. To be most generous to Appellant, perhaps, when he testified under oath before the Washington County Court, his memory replaced the one judge with the other.

5 The assertions in Appellant's Statement of the Case that Judge Connarn "summarily denied the motion" and that he did so "without stating any reasons therefore" do not accurately reflect the record. The Judge had heard considerable argument, had specifically inquired of Appellant's counsel if he had any further argument (S. 36), had been told by counsel that he had nothing further (S. 37) and then, in denying the Motion, stated his reasons at length (S. 37).

ARGUMENT

POINT I: THERE HAS BEEN NO BASIS LAID BY APPELLANT FOR THE ASSERTION OF A DUE PROCESS CLAIM ON THE GROUNDS PRESENTLY URGED.

At the outset we observe that most federal court consideration of the issues and policies surrounding the question of disqualification of judges arose in connection with the relevant federal statutes, 28 U.S.C. §§144, 155. Many of the cases cited by Appellant involved more restrictive questions of statutory interpretation. While, as discussed below, those cases are of some help in any discussion of policy, they do not purport to speak to the issue of constitutional minimums. In those few cases where the federal courts, including the United States Supreme Court, have measured the refusal of a state court trial judge to disqualify himself against Fourteenth Amendment standards, the respondent had, by appropriate and timely motion, clearly stated his grounds to the trial judge for his claim of bias and prejudice. This contrasts with Appellant's claim of bias on grounds never raised before Judge Connarn.

In In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 79 L.Ed. 942 (1955), the respondents, who had been charged with criminal contempt, specifically raised Due Process Clause objections before the trial judge which were rejected.[1] The State Supreme Court sustained these holdings, and the United States Supreme Court granted

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1 In re Murchison, supra, 349 U.S. at 135.

certiorari.[2] A more recent Supreme Court decision reflects similar careful preservation of issues. In Johnson v. Mississippi, 403 U.S. 212, 91 S. Ct. 1778, 29 L.Ed.2d 423 (1971), another contempt case, motions supported by affidavits requested of the trial judge that he excuse himself; the grounds were stated with particularity and supported with specific fact allegations.[3]

As pointed out in the Counter-Statement of the Case, Appellant raised before Judge Connarn none of the grounds presently pressed on this Court. Unless the federal courts are prepared to constantly rule on a state court judge's qualification to serve where that same judge is given no opportunity to rule on the pertinent grounds for alleged bias - the most difficult of all allegations to determine fairly - they must insist that fair notice be given to such judges in the same manner as is required in all federal courts.

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2 Ibid at 136.

3 It does not appear whether such motions were made at all in Mayberry v. Pennsylvania, 400 U.S. 488, 91 S. Ct. 499 (1971), but, assuming they were not made, the situation is distinguishable because it would have been too much to ask such steps of respondents in that case inasmuch as the trial judge summarily punished respondents for contempt without advance warning that he was going to do so. 91 S. Ct. at 500, the opinion below, sub. nom. Commonwealth v. Langnes, 255 A.2d 131, 132-3, 135, 434 Pa. 478. It should also be recognized that the case, together with Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353, were urgently needed judicial responses to the tactic of intentional, gross misbehavior in the courtroom which was, at that time, finding growing favor with certain types of defendants. See Mr. Chief Justice Burger's concurring opinion in Mayberry. At the most, this willingness to second guess a trial judge where he has never received notice of the objections to him sitting, should be reserved to the most compelling situations.

A recent statement of the common federal requirement under the statute is given in a case cited by the Appellant, United States v. Thompson, 483 F.2d 527, 528 (C.A. 3 1973). The Court was repeating the well-established procedural requirement that the trial court be presented with an affidavit of bias containing material facts stated with particularity which, if true, would convince a reasonable man that bias exists and that such bias is personal, not judicial, in nature.[4] Otherwise, the judge has a duty not to disqualify himself. Rosen v. Sugarman, 357 F.2d 794 797-798 (2d Cir. 1966).

Further, this Court has clearly said that no judge should be charged with failure to take action which has never been requested. United States v. Sansone, 294 F.2d 277 (2d Cir. 1961). We think there are ample policy reasons underlying the decision in Sansone.

If this Court were to encourage original review by the federal courts of a state judge's qualifications to sit, it would drastically change national practice. Except for a few states which have provided for automatic disqualifications,[5] it is widespread practice in state courts to leave the decision to the judge affected. Frank, Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Probs. 43, 56-57 (1970). Moreover, courts who have ruled on this question and writers who have discussed it have noted, any system other than one requiring full notice to the trial judge

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4 For a discussion of this doctrine, see Note: Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1441-2 (1966).

5 For example, Alabama, Indiana.

himself of the grounds and specific supporting facts, is wide open to abuse. The most obvious tactic, of course, would be for a respondent to sit quietly and see how the case goes; if it goes against him he can file a writ of habeas corpus in federal court and seek a new trial. What Appellant seeks here is almost as brazen, tempered only by the fact that he originally raised the specific facts now relied upon in a state post-conviction relief proceeding rather than in federal court.[6]

As one writer has emphasized, the specific procedural requirements read into 28 U.S.C. §144 have been designed to safeguard against abuse. Note: Disqualification of Judges, supra, 79 Harv. L. Rev. at 1441. It is for this reason that there must be an affidavit stating specific facts, that it must be certified by counsel of record, that it must be filed in accordance with strict time requirements and that no litigant may file more than one affidavit. Note: Disqualification of Judges, supra, 79 Harv. L. Rev. at 1441-1445.

It is also because of this very risk of abuse that automatic disqualification systems have come under heavy fire. Orfield, "Recusation of Federal Judges," 17 Buff. L. Rev. 805 (1968).

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6 If federal courts move to permit such review as long as some motion has been filed, then we will have many such motions as Appellant filed which allege certain facts in support of disqualification but are later used on appeal as a vehicle supporting wholly different factual allegations.

citing Note, 38 Ind. L.J. 289 (1963). See also Note: Disqualification of Judges Because of Bias and Prejudice, 51 Yale L.J. 169 (1941).

The strongest argument Appellee conceives for Appellant is that a trial judge should recuse himself whenever his attention is drawn to a possibility of the appearance, as contrasted with the fact, of impropriety. This case demonstrates the difficulty of applying such a standard if the respondent is not required to call to the court's attention the specific facts giving rise to such an appearance of impropriety. Judge Connarn had only the vagest recollection of appearing as a prosecutor in an earlier case involving Appellant. In 1965-66 the Vermont Attorney General handled all post-conviction relief proceedings which were, and are, filed by the hundreds. It is highly unlikely that a sitting judge will be able to recall such incidents even when their attention is specifically directed to them - much less to recall them spontaneously.

Moreover, this standard of "appearance of impropriety" will be difficult enough to apply even under present federal procedures. This standard originates in Canon 4 of the ABA Canons of Judicial Ethics.[7] Of similar thrust is the ABA Criminal Justice

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7 Canon 4: "A judge's official conduct should be free of impropriety and the appearance of impropriety."

Standards Relating to the Function of the Trial Judge.[8] However, the application of this concept by the Supreme Court has met with criticism. As noted recently by Mr. Justice Rehnquist,[9] John P. Frank is the leading commentator in this field. But Frank is disturbed by the Supreme Court's application of the appearance-of-impropriety concept in Commonwealth Coatings Corp. v. Continental Casualty Company.[10]

> The loose and ambiguous standard endorsed by the Supreme Court in Commonwealth Coatings is troublesomely vague as a guide to conduct; it comes close to being an appeal to conformity for conformity's sake. It is a standard which in the great cases, at least, is subject to the abuse of manipulation.
> Frank, supra, 35 Law & Contemp. Probs. at 59-60.

To avoid such abuse, then, it is essential that, at the very least, litigants be required to draw the court's attention to specific facts which could give rise to an appearance of impropriety.

Finally, fair notice of the trial judge is essential if this Court's doctrine that a judge is duty-bound not to disqualify himself upon legally insufficient grounds is to have any vitality. As mandated

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8 Standard 1.7: "The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned."

9 Laird v. Tatum, _____ U.S. _____, 91 S. Ct. 7, 11 (1972).

10 393 U.S. 145 (1968). The court held that an arbitrator, though in fact perfectly fair, must "disclose to the parties any dealings that might create an impression of possible bias."

in Rosen v. Sugarman,[11] and recently reiterated in United States v. Sclafani,[12] a judge must inquire into the legal sufficiency of the facts in the affidavit. How can a judge do so if neither an affidavit nor, as a minimum, a statement of the grounds in the motion itself, is before him. What would Rosen mean if a litigant can later, on appeal, successfully advance grounds not mentioned in the affidavit or motion?

This equal duty of a judge to sit when he should has found favor in all circuits. For a listing by circuit of cases so holding, see Frank, supra, 35 Law & Contemp. Probs. at 51 (footnote 35). This concept is also approved by the ABA in its comment to Standard 1.7 Relating to the Function of the Trial Judge, citing Wapnick v. United States, 311 F. Supp. 183 (E.D.N.Y. 1969). Unless the specific facts are presented to the trial judge, whether state or federal, "judge-shopping," trial delays and inefficient use of judicial manpower are certain to follow.

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11 357 F.2d 794, 797 (C.A. 2, 1966) citing In re Union Leader Corp. 292 F.2d 381, 391 (C.A. 1, 1961), cert. denied, 368 U.S. 927, 82 S. Ct. 361, 7 L.Ed.2d 190 and Tucker v. Kerner, 186 F.2d 79, 85 (C.A. 7, 1950).

12 487 F.2d 245, 255 (1973) citing Rosen, supra, Union Leader, supra, Town of East Haven v. Eastern Airlines, Inc. 293 F. Supp. 184, 189 (D. Conn. 1968), and United States ex rel Rogers v. Richmond, 178 F. Supp. 44, 48 (D. Conn. 1958).

POINT II: EVEN WERE THIS COURT TO REACH THE MERITS, JUDGE CONNARN"S CONDUCT FALLS FAR SHORT OF VIOLATING APPELLANT'S RIGHT TO DUE PROCESS

Before discussing Appellant's claim that several factors in this case coalesce to produce an effective denial of due process, we would look first to each substantial factual allegation individually. While in the course of his brief Appellant concedes that each such purported ground for disqualification on appeal has been held to be insufficient, we think there is something to be gained from a closer look.

Trial Judge as a Former Prosecutor of a Respondent. While making continued reference throughout the Brief[1] to Judge Connarn's earlier role of prosecutor of Appellant, Appellant is content to cite United States v. Maroney, 280 F. Supp. 277, 279 (W.D. Pa.), cert denied 393 U.S. 873 (1968) in support of his theory that, while not enough for disqualification standing alone, it would be sufficient if coupled with other grounds. Certain prior contact as a prosecutor is clearly grounds for disqualification. "Some situations requiring recusation are obvious, such as ... [p]articipation in the investigation of the case or in commencement of the prosecution ***"[2] This has been obvious ever since In re Murchison, supra. There the trial judge, acting as a one-man grand jury, had initiated the very action over which he subsequently presided. The Supreme Court

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1 Appellant's Brief, pp. 4, 9 (twice), 14, 17 and 18.
2 Comment to Standard 1.7, ABA Criminal Justice Standards Relating to the Function of the Trial Judge.

had little difficulty finding a denial of due process in such a situation, but the reasons are significant. After noting that "no man can be a judge in his own case,"[3] a clear reference to the fact that the judge was sitting on the identical case he prosecuted, the court re-emphasized this aspect.

> As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his "grand jury" secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings ... [An] incident also shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness. 349 U.S. at 138.

Our point is obvious. The Court was concerned with the knowledge gained in the <u>particular</u> case during the judge's earlier stint as semi-prosecutor. Moreover, other language in the opinion demonstrates that the Court was equally concerned with a carry-over of prosecutorial zeal to his duties as trier of the facts in the same case.[3a] 349 U.S. at 137.

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3 349 U.S. at 136.

3a Compare Mr. Justice Rehnquist's Memorandum explaining his refusal to disqualify himself where his knowledge of the specific facts in the particular case was in issue; he based his refusal on the fact that he had not participated, "either of record or in any advisory capacity," in any court in the government's conduct of the case. <u>Laird v. Tatum</u>, <u>supra</u>, 93 S. Ct. at 10.

United States v. Maroney, supra, cited by Appellant, tells us that the Murchison rule does not extend to prior unrelated prosecutions of a respondent by the trial judge.[4] Thus, Maroney is consistent with the reasoning of Murchison. Knowledge gained or zeal developed by a man acting as prosecutor in a specific case must not be permitted to indirectly affect the trial of that same case through the participation of the former prosecutor as a newly-appointed trial judge.

Our case is even farther afield. Judge Connarn had never actively prosecuted Appellant for any criminal offense. His function was limited to a single appearance, in the prosecutorial function of the State's Attorney General, to defend a prior successful prosecution against post-conviction relief attack. As the transcript demonstrates, Judge Connarn's involvement as a "prosecutor of Appellant" was limited to "some argument" before the Vermont Supreme Court. (Tr. 45).

Prior Judicial Contact of a Trial Judge with a Respondent. The controlling Supreme Court opinion, United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L.Ed.2d 778 (1966), citing Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L.Ed. 1181 (1921), seems to set up at least two criteria:

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4 Interestingly, Texas, whose constitution disqualifies any judge who had prosecuted the respondent previously has limited that constitutional provision to application only where the prior conviction is alleged for enhancement in the indictment. Ex parte Washington, 442 S.W.2d 391 (1969).

> The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. 384 U.S. at 583.

In concert with the first criteria, that any bias must stem from an extra-judicial source, it has been uniformly held by all circuits faced with the issue that contact with a respondent and knowledge of and familiarity with that respondent gained through prior judicial hearings does not automatically or inferentially raise the issue of bias. United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) citing cases from the Third, Eighth and Ninth Circuits; United States v. Sansone, 319 F.2d 586 (2d Cir. 1963); United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971)[5] with extensive citations.[5a]

Despite this extensive body of case law, Appellant would have us believe that Judge Connarn manifested bias by imposing a "draconian" sentence[6] and by, in a prior bail hearing, setting an excessively high amount

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5 Cited by the lower court in the case at bar.

5a Perhaps significantly, in at least one instance Appellant's prior judicial contact with Judge Connarn proved beneficial. (Tr. 43-44; Washington County Court Finding No. 43).

6 Appellant's Brief at 15.

of bail.[7] This Court specifically rejected such arguments in Wolfson v. Palmieri, 396 F.2d 121, 125 (2d Cir. 1968).[8]

Personal Relationship of Trial Judge to Likely Witness. The final asserted ground, which has any factual substantiation, is Judge Connarn's prior relationship with Norbert J. Towne, a probable witness if the case had gone to trial. Appellant cites us to no authority for the proposition that a personal relationship between the trial judge and a witness is a legally sufficient ground for disqualification.

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7 Appellant's Brief at 15-16. It is not difficult to develop factors fully supporting the sentence meted out and the bail amount established. As is evidenced in the testimony given before the Washington County Court, and the findings of that court (Findings 25, 26 and 27(a)), Appellant has an extensive list of prior felony convictions. Moreover, it was clear to the sentencing court that Appellant only escaped prosecution as an habitual offender by pleading guilty pursuant to a plea-bargaining agreement (A. 7). The very availability of high maximums is to give a court the flexibility to deal with recidivist criminals like Appellant.

As to bail, the Vermont statute (13 V.S.A. §7554(b) specifically provides that a judicial officer, in setting bail, shall take into account the individual's record of convictions along with several other factors. Thus, such comparisons as Appellant attempts on pages 15 and 16 of his Brief are meaningless.

8 Citing Calvaresi v. United States, 216 F.2d 891, 950 (10th Cir. 1954)., For a general discussion, see Annotation, Disqualification of Judge for Having Decided Different Case Against Litigant, 21 A.L.R.3d 1369, 1375-1377.

We have not been able to find any cases on point. There is language in the ABA Comment referred to above[10] indicating that a relationship of consanguinity or affinity with the prosecuting witness or other key figures in the trial is a situation obviously requiring recusation. Unfortunately, the Comment cites no authority for this statement. At any rate no such blood relationship existed between Judge Connarn and Towne.

By way of contrast, a judge is not even necessarily disqualified to sit in a case where he, himself, will be a witness. As summarized by a recent Annotation in ALR3d, most courts in this country take the view that a judge is not necessarily rendered disqualified to sit in a case where he will testify as a witness. The criteria varies among courts, some testing against the materiality of the judge's testimony, some placing the decision to disqualify in such cases solely in the discretion of the judge himself, and some not announcing any guiding principle.[11]

It seems logical to conclude that a judge is not disqualified to sit by reason of a personal relationship with any witness by comparing that concept with the judge-as-a-witness rule.

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10 Comment under Standard 1.7, ABA Criminal Justice Standard Relating to the Function of the Trial Judge.

11 Annotation: Disqualification of a Judge on Ground of Being a Witness in the Case, 22 A.L.R.3d 1198.

And we emphasize that the issue of the witness's believability never arose inasmuch as Appellant pleaded guilty obviating the need for a trial. Moreover, we are not talking of a personal relationship with the victim of a violent crime nor, in fact, with a victim at all, facts which might support a contention that the affected judge should disqualify himself from passing sentence. Here the bank, not Towne, was the victim of Appellant's crime of false token. The assertion that, by reason of his personal contact with Towne, Judge Connarn is disqualified in such a case as this is an assertion without foundation in either precendent or policy.

Coalescence Theory. Finally, we come to Appellant's argument that, when these factors are found in a single case, they coalesce to produce a whole greater than the sum of its parts. It is at first blush an appealing theory and possibly, in a case actually presenting a fact pattern of borderline judicial conduct, a viable one. But it should be of scant comfort to Appellant in the case at bar.

What are the actual converging factors in this case? It is true that Judge Connarn had prior judical contact with Appellant, including functions both as trial judge and as sentencing judge. It is also true that, as Vermont's Attorney General, Judge Connarn once presented argument to our State's high court in opposition to a petition by Appellant for post-conviction

relief. And it is true that Judge Connarn and a possible witness had had a business relationship many years before. From these threads, Appellant would weave a cloth of such gross judicial impropriety as to offend Appellant's Fourteenth Amendment right to due process. It seems to us that to merely state the theory is to repudiate it.

First, it is important to keep in mind a point touched on above,[12] that there is a considerable difference between constitutional minimums and standards established by more restrictive statutes. As John P. Frank puts it,

> There are two sources of the law of disqualification, the common law and the statutes. But these are to some extent overlaid by the constitutional conception of due process. That is to say, some kinds of disqualification were so absolutely basic that justice would be altogether denied if a judge were allowed to participate in a case. This amounts to what ought to be regarded as the inner core of disqualification. Surrounding that inner core are the group of further restrictions which are not constitutional, but are simply refinements.
> Frank, supra, 35 Law & Contemp. Probs. at 45.

If Appellant is properly before this Court at all, it can only be on the basic of the denial of a constitutional right.[12a] Any relief could only be based on a finding that the state court procedures offended the Due Process Clause, that is, an error of such magnitude

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12 See the first paragraph under Point I.

12a See, for example, Tollett v. Henderson, _____U.S. _____, 93 S. Ct. 1602, 1608 (1973).

must have occurred so as to affect the "inner core of disqualification." As indicated by Frank, such disqualifications would properly involve, for example, situations where the judge has a direct interest in the proceeding.[13] But we have tried to demonstrate by a discussion, individually, of each ground raised by Appellant, that this case does not even approach one of constitutional dimensions.

Secondly, Appellant's case is little more than the claim that a judge with prior judicial contact is automatically disqualified; automatically, because no motion raising this issue was ever made to Judge Connarn. It is nothing more than this because Judge Connarn was never a prosecutor of Appellant other than in name and because the witness relationship claim could hardly be weaker.

The Supreme Court, as discussed above, was concerned with a carry-over of knowledge and zeal from a prosecution function to the judicial function in one case. Yet here we do not have anything approaching that problem. In a small state, such as Vermont, the Attorney General and his staff argue on appeal from many denials of post-conviction relief and from all denials of petitions for a writ of habeas corpus. In a very short time, every Attorney General in our state has been and is similarly involved with most of the incarcerated felons. To hold that all such office holders and

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13 Frank, supra, 35 Law & Contemp. Probs. at 45-46.

their staff - or even just those staff members specifically involved - if elevated to the judiciary, may not sit as a sentencing judge in a subsequent case involving any of those felons would be to seriously disrupt our State's judicial system and to introduce great delay in the administration of criminal justice. Surely this minimal contact does not add significantly to the judicial contact objection.

Moreover, such a holding would seem in stark contrast to modern correctional policy which has, as a cornerstone, the practice of providing a sentencing court with full information on a respondent through the vehicle of a pre-sentence report. In terms of sentencing, as contrasted with a judge sitting as the trier of facts, any knowledge gained by a judicial officer in a prosecutorial function is available in the pre-sentence report no matter who passes sentence. Any "bias" created by knowledge of an individual's past conduct is now generated by the system in every sentencing judge, and this is no grounds for a due process claim.

The claim of prejudice by reason of a past personal relationship to an individual who might have been a witness but was not, because of Appellant's decision to plead guilty, seems to add very little as a matter of common sense.

POINT III: IN THE ALTERNATIVE, IF THE COURT HOLDS APPELLANT'S SENTENCE TO BE INVALID, THE STATE OF VERMONT SHOULD BE GIVEN A REASONABLE AMOUNT OF TIME IN WHICH TO RE-SENTENCE APPELLANT.

As early as 1890 the Supreme Court was faced with the dilemma of a prisoner whose sentence was invalid but who was just as clearly guilty of a serious crime. Ex Parte Medley, 134 U.S. 160, 10 S. Ct. 384, 33 L.Ed. 835. After some puzzling, as a recent United States District Court put it,[1] the Supreme Court issued an "alternative writ" which, in effect, gave the State at least ten days in which to re-sentence the petitioner and cure the defect.

In 1964 the Tenth Circuit, without seeing any need for discussion, adopted a similar procedure. Hollon v. Tinsley, 334 F.2d 762 (10th Cir. 1964). In that case, as in the case at bar, the petitioner had plead guilty but later attacked the validity of his sentence by petitioning for a writ of habeas corpus. Upon finding that the sentence was invalid, the Tenth Circuit entered "an order discharging the applicant from custody under the sentence, but staying its effectiveness for 30 days to enable the state if it is so advised to take applicant before the state court in which his plea of guilty was entered for the imposition of a valid sentence." 334 F.2d at 763.

For more recent cases discussing the latest Supreme Court case as authority supporting the positions that

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1 Willoughby v. Phend, 301 F. Supp. 644, 648 (N.D. Ind. 1969).

the nullity of a conviction does not follow from the unconstitutional character of the punishment imposed and that the Tenth Circuit approach is the proper remedy in cases similar to that before this Court, see Willoughby v. Phend, supra, and Washington v. Regan, 373 F. Supp. 1368, 1371 (D. N.J. 1974).

CONCLUSION

We ask this Court to affirm the lower court's decision or to dismiss the appeal as taken under a Certificate of Probable Cause improvidently granted, on the grounds that Appellant raised none of the factual allegations now relied upon before the trial judge.

Additionally, we ask this Court to affirm the lower court decision on the grounds that Appellant has failed to demonstrate any manifestation of actual bias, that both the Washington County Court[1] and the lower federal court "searched the record in vain for indicia of actual or subjective bias by the judge,"[2] and that Appellant's theory of coalescence is not supported by the facts of this case.

In the alternative, if this Court finds that Appellant's sentence was imposed improperly such that some relief is appropriate, we ask that the State of Vermont be given a reasonable amount of time in which to re-sentence Appellant and cure the defect.

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1 Findings 43, 44 and 45.
2 Appellant's Brief, Appendix B, p. 4.

Respectfully submitted this 10th day of July, 1974.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 10th day of July, 1974, the undersigned Assistant Attorney General of the State of Vermont, served two true conformed copies of the foregoing Brief upon the above-named Appellant by depositing the same in a sealed envelope, first-class postage prepaid, addressed as follows:

Zachary Shimer, Esq.
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Raymond L. Betts

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